U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 19-0499 BLA
and 19-0530 BLA

JOYCE FAYE SLUSS (o/b/o and Widow of LYNN R. SLUSS) Claimant-Respondent v. MATT MINING COMPANY, INCORPORATED and LIBERTY MUTUAL INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/09/2020 DECISION and ORDER

Appeal of the Decisions and Orders Awarding Benefits of Paul R. Almanza, Associate Chief Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Johnson City, Tennessee, for Employer.

Ann Marie Scarpino (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Associate Chief Administrative Law Judge Paul R. Almanza's Decisions and Orders Awarding Benefits (2014-BLA-05422 and 2019-BLA-05318) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on June 18, 2013, and a survivor's claim filed on September 11, 2018.[1]

In the miner's claim, the administrative law judge credited the Miner with 15.97 years of surface coal mine employment in conditions substantially similar to those in an underground mine and found he was totally disabled. 20 C.F.R. §718.204(b)(2). He therefore determined Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] and established a

[1] Claimant is the widow of the Miner, who died on August 15, 2018. On June 11, 2007, Administrative Law Judge Larry W. Price denied the Miner's first claim, filed on February 1, 2005, for failure to establish pneumoconiosis. Director's Exhibit 1. Claimant initially appealed the decision, but then filed a request for modification, which the district director denied on December 18, 2008. *Id*. The Miner did not take any further action until he filed the current claim. Director's Exhibit 2. Claimant is pursuing the miner's claim on behalf of his estate and her survivor's claim. Motion to Amend Case Caption filed August 22, 2018.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's totally disabling respiratory or pulmonary impairment is due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

change in an applicable condition of entitlement.[3] He further found Employer did not rebut the presumption and awarded benefits.

In a separate Decision and Order Awarding Benefits in the survivor's claim, the administrative law judge granted Claimant's motion for summary judgment,[4] finding her automatically entitled to benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*),[5] based on the award of benefits in the miner's claim.

On appeal, Employer challenges the constitutionality of the Affordable Care Act (ACA), and therefore the constitutionality and applicability of the Section 411(c)(4) presumption, enacted as part of the ACA. Alternatively, it challenges the administrative law judge's determination that Claimant established the fifteen years of qualifying coal mine employment necessary to invoke the presumption. Claimant responds in support of the awards in both claims. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response brief, urging the Benefits Review Board to reject Employer's arguments concerning the constitutionality of the ACA.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decisions and Orders if they are rational, supported by

[3] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the administrative law judge must also deny the subsequent claim unless he finds "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). The Miner's prior claim was denied because he failed to establish pneumoconiosis; therefore, to obtain review of the merits of his claim, Claimant had to establish this element of entitlement. Director's Exhibit 1.

[4] On March 22, 2018, Claimant moved for summary judgment, arguing there was no genuine issue of material fact concerning whether she was automatically entitled to benefits pursuant to Section 422(*l*). Employer opposed Claimant's motion, asserting the claim should be held in abeyance pending a final resolution in the miner's claim.

[5] Section 422(*l*) of the Act provides that the survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits, without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

substantial evidence and in accordance with applicable law.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Constitutionality of the ACA and the Section 411(c)(4) Presumption

Citing *Texas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018), *stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the requirement for individuals to maintain health insurance in the ACA is unconstitutional and the remainder of the legislation, including its reinstatement of the Section 411(c)(4) presumption is inseverable. Employer's Brief at 7-8; *see* Pub. L. No. 111-148, §1556 (2010). Employer alternatively urges the Board to hold this appeal in abeyance pending resolution of the legal arguments in *Texas*. The Director responds that because the district court stayed its ruling, the decision does not preclude application of the amendments to the Act found in the ACA. Director's Brief at 1-2.

We agree *Texas* does not affect application of Section 411(c)(4) to this claim. After the parties filed their briefs, the United States Court of Appeals for the Fifth Circuit held the health insurance requirement in the ACA unconstitutional, but vacated and remanded the district court's determination that the remainder of the ACA must also be struck down. *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019) (King, J., dissenting), *cert. granted*, U.S. , No. 19-1019, 2020 WL 981805 (Mar. 2, 2020). Moreover, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, held the ACA amendments to the Act are severable because they have "a stand-alone quality" and are fully operative. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012). Further, the United States Supreme Court upheld the constitutionality of the ACA in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) and the Board has declined to hold cases in abeyance pending resolution of legal challenges to the ACA. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-26 (2011); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010). We therefore reject Employer's argument that Section 411(c)(4) is unconstitutional and inapplicable to this case, and deny its request to hold this case in abeyance.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the Miner's coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1.

Miner's Claim - Invocation of the Section 411(c)(4) Presumption

Length of Qualifying Coal Mine Employment

Because the Miner had a totally disabling respiratory impairment,[7] Claimant is entitled to the Section 411(c)(4) presumption if the Miner had at least fifteen years of underground or substantially similar surface coal mine employment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. Conditions at a surface coal mine are "substantially similar" if the Miner was "regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2). Claimant bears the burden to establish the number of years the Miner worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an administrative law judge's determination of the length of coal mine employment if it is based on a "reasonable method" and is supported by substantial evidence. *Muncy*, 25 BLR at 1-27.

The administrative law judge considered the district director's findings, the Miner's application, on which he alleged seventeen years of coal mine employment, his testimony, his employment history form, and his Social Security Administration (SSA) earnings record. Decision and Order Miner's Claim (hereinafter, Decision and Order) at 4-8; Director's Exhibits 3-6. As the administrative law judge correctly observed, the regulations define a "year" of coal mine employment as "a period of one calendar year (365 days, 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.'" Decision and Order at 5, *quoting* 20 C.F.R. §725.101(a)(32); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 334-36 (4th Cir. 2007); *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003). Crediting the Miner's SSA record, the administrative law judge found the Miner was engaged in coal mine employment for either full calendar years or partial periods totaling more than a year in all of his employment from 1978 through 1993. Decision and Order at 6-8.

The administrative law judge also addressed whether the Miner had 125 working days within each year of his coal mine employment in order to be credited with a full year

[7] We affirm, as unchallenged on appeal, the administrative law judge's finding that the Miner was totally disabled due to a respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 25.

of coal mine work.[8] Decision and Order at 6-8. Because he could not ascertain the beginning and ending dates of the Miner's coal mine employment, he relied on the formula at 20 C.F.R. §725.101(a)(32)[9] and divided the Miner's yearly earnings, as reflected in his SSA earnings statement, by the average yearly earnings for coal miners for each year set forth in Exhibit 610 of the *Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual*.[10] Decision and Order at 6. Using this method, he credited the Miner with a full year of coal mine employment for each year from 1978 through 1984 and from 1986 through 1993, for a total of fifteen years. *Id*. at 6-7. He also credited the Miner with 0.97 of a year in 1985. *Id*. at 7. Thus, he found the Miner had a total of 15.97 years of coal mine employment. *Id*. The administrative law judge further noted the Miner testified all of his coal mine work took place at surface mines. *Id*. at 4. Finding the Miner was regularly exposed to coal mine dust while performing his surface work, the administrative law judge determined Claimant established at least fifteen years of qualifying coal mine employment, sufficient to invoke the Section 411(c)(4) presumption. *Id*. at 10, 25.

Employer first argues that in crediting the Miner with 15.97 years of coal mine employment, the administrative law judge "skipped a crucial step" of the required analysis by failing to determine whether the Miner had a calendar year of coal mine employment,

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[8] If the requirement of a calendar-year period is met, "it must be presumed, in the absence of evidence to the contrary, that the miner spent 125 working days in such employment[,]" in which case the miner is entitled to credit for one full year of employment. 20 C.F.R. §725.101(a)(32)(ii).

[9] Pursuant to 20 C.F.R. §725.101(a)(32)(iii):

> If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's daily average earnings for that year, as reported by the Bureau of Labor Statistics (BLS).

The BLS data is reported in Exhibit 610 of the *Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual*.

[10] The "average yearly earnings" figures appear in the center column of Exhibit 610 and reflect multiplication of the "average daily wage" by 125 days.

before determining he was regularly employed for at least 125 days within that year. Employer's Brief at 8-13. We disagree.

The administrative law judge found the Miner's SSA records reflect earnings from coal mine employment every year from 1979 through 1993 and that there was no evidence to suggest this employment "was sporadic, or anything but continuous."[11] Decision and Order at 6-8. Consistent with the administrative law judge's finding, the Miner testified he worked from 1979 through 1993 with three companies that operated as one: Fraleys Incorporated (Fraleys), Cane Patch Mining Company, Incorporated (Cane Patch), and Matt Mining Company, Incorporated (Matt Mining).[12] Hearing Transcript at 33-34; Director's Exhibit 1 – 2006 Hearing Transcript at 32-33. The Miner testified when Cane Patch shut down, "they moved me over to Matt Mining," which was across the road from Cane Patch. *Id*. at 34. He further acknowledged his paychecks would come from "different companies at different times," but equipment, men, and supervisors were shared by the companies

[11] Employer notes the Miner's SSA record reflects some fluctuation in earnings between 1980 and 1992. Employer's Brief at 12. As the administrative law judge found, however, his earnings are above the industry average in every year of his employment, except 1985 for which he was credited with a partial year. Decision and Order at 7. Further, as the administrative law judge noted, the Miner testified he often worked overtime and extra shifts. Decision and Order at 5; Hearing Transcript at 34-36, 39-40. In light of these factors, Employer has not explained how the Miner's similar, but not identical earnings undermine the administrative law judge's conclusion he established a full year of coal mine employment every year except 1985. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009).

[12] The Miner testified:

> Q : When you say the Company, who do you mean?
> A : I guess really it was Fraleys Incorporated because that is what it went by. The whole thing was under Fraleys Incorporated. They owned . . . Cane Patch Mining, they owned Matt Mining.

Director's Exhibit 1 – 2006 Hearing Transcript at 32-33. The Miner further testified he worked for Jerry Fraley at Matt Mining Company, Incorporated (Matt Mining) and, when asked how long he worked for Matt Mining, he stated he worked for them from 1979 to 1993. Hearing Transcript at 26.

throughout his employment.[13] Director's Exhibit 1 – 2006 Hearing Transcript at 13-14, 16, 18. Substantial evidence thus supports the administrative law judge's permissible finding that the Miner's SSA records reflect yearly relationships with the listed coal mine employers for the years 1978 through 1993. *See Muncy*, 25 BLR at 1-27; Decision and Order at 8. Thus, contrary to Employer's argument, the administrative law judge did not shift the burden of proof or fail to render a finding as to whether the Miner was employed for full calendar years.

Nor did he base his finding "solely on the average yearly earnings of coal miners." Employer's Brief at 13. The administrative law judge found Claimant established the Miner was engaged in coal mine employment for full calendar years, or partial periods totaling one year, during which he worked at least 125 days during those years. *See* 20 C.F.R. §§718.301, 725.101(a)(32). For 1985, the additional full calendar year during which the Miner's income was less than the average for 125 working days, the administrative law judge credited him with "a fractional year based on the ratio of the actual number of days worked to 125."[14] 20 C.F.R. §725.101(a)(32)(i).

We also find no merit to Employer's assertion that the administrative law judge's use of the yearly average wage in Exhibit 610, which is based on 125 working days, was erroneous because "the 125 rule applies exclusively to the identification of the responsible operator." Employer's Brief at 9. The regulations specifically provide "if the evidence

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[13] When asked if he had a profit sharing plan through Matt Mining, the Miner replied:

> I don't know really how they set it up but it was through the whole company. It didn't matter who you worked for . . . you went where they told you to go, when they told you to go there. And you stayed until they told you [to] leave and go somewhere else.

Director's Exhibit 1 – 2006 Hearing Transcript at 32.

[14] The administrative law judge found the Miner earned $14,828.05 in 1985 from coal mine employment. Decision and Order at 7; *see* Director's Exhibit 1 – 2006 Hearing Transcript at 13; Director's Exhibit 6. He credited the Miner with .97 year by dividing his income by the industry average yearly earnings for 125 working days. Decision and Order at 6-7. Mathematically, the result would be the same had the administrative law judge first calculated the Miner's number of working days by dividing his income by the industry average daily wage of $122.00 ($14,828.05/$122.00 = 121.5 days), and then credited him with a fraction of a year based on a 125 working-day year (121.5/125 = .97 year).

establishes that the miner worked in or around coal mines at least 125 working days during a calendar year or partial periods totaling one year, then the miner has worked one year in coal mine employment *for all purposes under the Act*." 20 C.F.R. §725.101(a)(32)(i) (emphasis added). Thus, contrary to Employer's argument, the definition of one year of coal mine employment is the same for identification of a responsible operator and application of the presumptions under the Act. *See* 65 Fed. Reg. 79,951 (Dec. 20, 2000) (20 C.F.R. §725.101(a)(32) contains a "single definition with general applicability."). We therefore reject Employer's arguments and hold the administrative law judge based his finding on a reasonable method of computation. *See Mitchell*, 479 F.3d at 334-36; *Clark*, 22 BLR at 1-280; *see also Shepherd v. Incoal, Inc.*, 915 F.3d 392, 401 (6th Cir. 2019), *reh'g denied*, No. 17-4313 (6th Cir. May 3, 2019); *Muncy*, 25 BLR at 1-27; *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986).

Employer next challenges the administrative law judge's finding that the Miner's surface coal mine employment took place in conditions substantially similar to those in an underground mine "throughout his employment." Employer's Brief at 13-15.

The administrative law judge noted the Miner testified that throughout his career he operated a drill, drove a bulldozer, hauler, and loader, and cleaned coal, and stated all of these jobs were dusty.[15] Decision and Order at 4, 10; Hearing Transcript at 26-29. He described the dust on the surface as "unreal" and testified he was exposed to coal dust on a daily basis during all of his surface coal mine employment[16] and was covered in coal and rock dust from head to toe after a shift. *Id*. at 26-27, 29. He testified that sometimes "you couldn't even see twenty-five foot in front of you." *Id*. at 27. The administrative law judge found the Miner's uncontradicted testimony "fully credible" and therefore sufficiently

[15] The Miner testified he was covered from head to toe in coal and rock dust especially after operating a drill because water was not used to keep the dust down. Hearing Transcript at 27-28. He testified he was exposed to coal mine dust "real bad" when operating a hauler because the roads were not watered down. He stated even though he had an enclosed cab, the dust came in and he could "barely breathe." *Id*. at 29. When asked how dusty it was when he was cleaning coal, the Miner replied it was "pitiful." He further explained that by the ". . . time you got the coal cleaned and broke up and piled up and stuff, you'd have a half inch of dust on the inside of the loader." *Id*. at 28.

[16] When asked whether he was "exposed to coal dust on a daily basis during [his] employment on the surface," the Miner responded "[t]he whole time." Hearing Transcript at 29.

demonstrated regular exposure to coal mine dust in his surface mine employment. Decision and Order at 10.

We reject Employer's argument that it is "unclear" regarding which mine or company the Miner was referring to in his testimony. Employer's Brief at 15. As the administrative law judge found the Miner credibly testified that he was exposed to coal dust on a daily basis during all of his surface coal mine employment and was covered in coal and rock dust after each shift, Employer has not explained how further discussion of the names of the mines or companies would make any difference. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (the appellant must explain how "error to which [it] points could have made any difference"). Thus, we affirm as supported by substantial evidence the administrative law judge's finding that Claimant established at least fifteen years of qualifying coal mine employment. *Muncy*, 25 BLR at 1-27; Decision and Order at 7. Consequently, we also affirm his finding that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1)(i)-(iii); Decision and Order at 25.

Because the administrative law judge found Employer did not rebut the presumption, a determination we affirm as unchallenged on appeal,[17] we affirm the award of benefits in the miner's claim. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 38.

Survivor's Claim

The administrative law judge granted Claimant's Motion for Summary Judgment and found Claimant automatically entitled to survivor's benefits under Section 422(*l*) based on the award of benefits in the miner's claim. Survivor Decision and Order at 1-2. *Rothwell v. Heritage Coal Co.*, 25 BLR 1-141 (2014). As Employer does not challenge these findings and because we have affirmed the award of benefits in the miner's claim, we affirm the administrative law judge's determination that Claimant is derivatively entitled to survivor's benefits pursuant to Section 422(*l*). 30 U.S.C. §932(*l*) (2018); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

[17] While Employer argues the administrative law judge erred in crediting the opinions of Drs. Raj, Wooten, and Green on the issue of legal pneumoconiosis, it concedes any error would be harmless if the administrative law judge's finding of invocation of the Section 411(c)(4) presumption is upheld. Employer's Brief at 16-20.

Accordingly, the administrative law judge's Decisions and Orders Awarding Benefits are affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge